CHONG FONG YEEN & ANOR. v. TAN KHIAM WAH.

[Court of Appeal (Foster Sutton, C.J., Abbott and Wilson, JJ.) Kuala Lumpur, February 8, 1951]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 6 — "Any such debt" — Construction of.

The words "any such debt" which occur in paragraphs (a) and (b) of the proviso to section 6 of the Debtor and Creditor (Occupation Period) Ordinance, 1948, refer only to occupation debts, which under the agreement between the parties thereto, would have been payable in occupation currency.

Case referred to :—

(1) *Mullins v. Treasurer of Surrey* (1880) 5 Q.B.D. 170.

COURT OF APPEAL.

M. N. Cumarasami for the appellants.

T. Rajendra for the respondent.

The facts and arguments appear sufficiently from the judgment of Foster Sutton, C.J.

Foster Sutton, C.J. : — The arguments on this appeal were solely directed to the question as to the construction which should be placed upon the words "any such debt" in paragraph (a) of the proviso to section 6 of the Debtor and Creditor (Occupation Period) Ordinance, 1948.

On behalf of the appellants it was argued that if construed according to their ordinary grammatical construction they can only relate to the words "any occupation debt", which appear in the body of the section, without any further qualification, and that to hold otherwise would be tantamount to saying that the words "or which was incurred after the twelfth day of August, 1945", which appear at the end of paragraph (a), are superfluous, void or insignificant, a conclusion which would offend against the well settled canon of construction, namely, that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be so regarded. Further arguments were adduced on behalf of the appellants directed to the proposition that it was clearly the intention of the Legislature to nullify occupation debts of every description which were incurred after the 12th August, 1945, and the appellants' advocate urged that the construction contended for by him achieves that result.

The respondent's advocate contended that there is no ambiguity and that the words clearly apply only to any occupation debt which falls to be re-valued under the enacting part of the section, but if there is any ambiguity the Court should, if possible, adopt a construction which will avoid creating hardship and injustice.

In considering the issue raised on this appeal it is, in my opinion, relevant to bear in mind the object of inserting a proviso to an enacting clause. Properly employed a proviso is only inserted to except something which would otherwise fall within the mischief of a clause. As Lush, J., said in *Mullins v. Treasurer of Surrey*[1], "When one finds a proviso to the section, the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso".

It is a fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. While it is true that a proviso to a section may assist in determining which of two reasonable constructions ought to be placed upon it, it would obviously be wrong to invoke a proviso to give an entirely different meaning to a section from that which, standing alone, it would bear.

The enacting part of the section under consideration here clearly only applies to transactions effected during the occupation period where the parties failed to provide for repayment in a currency other than occupation currency. To invoke the words "or which was incurred after the twelfth day of August, 1945" in paragraph (a) of the proviso to support the construction of the words "any such debt" contended for by the appellants would, in my opinion, be the same as saying that in this instance the effect of the proviso is to bring within the scope of the section transactions which, without the proviso, are expressly excluded.

It seems to me that the Legislature by the enactment of section 6 and the Schedule to the Ordinance intended to provide a formula whereby the amount to be paid in respect of unsatisfied occupation debts which were repayable in a currency which had long since gone out of circulation, could be ascertained. It would require clear and unambiguous language to justify a construction being placed upon the words in question involving the proposition that it was the intention of the Legislature to make a new contract for the parties even in cases where there would appear to be no reasonable justification for doing so. Unless that was the intention the words "any such debt", which appear in the first line of paragraph (b) of the proviso, can only have reference to occupation debts which were not "expressly made payable otherwise than in occupation currency". In my opinion those words have the same

meaning in both paragraphs of the proviso and in each case they have reference only to occupation debts which, under the agreement between the parties, would have been repayable in occupation currency.

Many things find their way into saving clauses *ex abundanti cautela* and, in my view, that is the reason why the reference to the 12th August, 1945, was included in paragraph (a) of the proviso to section 6.

For the reasons I have already given I am of the opinion that this appeal should be dismissed with costs.

Abbott, J.: — I concur.

Wilson, J. : — I concur.

Appeal dismissed.

TAN YOU v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Abbott, J.) Malacca, February 21, 1951]

Emergency (Rubber Control) Regulations, 1949, Regulation 4(1) — Recent possession of stolen property — Explanation given by accused — Principle to be applied in possession cases.

Where the only evidence against the accused is that he was in unlawful possession of property the court may infer guilty knowledge (i) if the accused has offered no explanation or (ii) if it is satisfied that any explanation offered is untrue; but if the explanation offered leaves the court in doubt as to whether it is true or not, the case has not been proved and the proper verdict should be not guilty.

Case referred to :—

(1) *Rex v. Aves* (1950) 2 All E.R. 330.

MAGISTRATE'S APPEAL.

C. S. Jayaswal for the appellant.

H. Shepherd (Federal Counsel) for the respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Abbott, J. : — The appellant was convicted by the Magistrate at Jasin of being in unlawful possession of fifty-four sheets of rubber contrary to the provisions of regulation 4(1) of the Emergency (Rubber Control) Regulations, 1949. This is an appeal against conviction.

The appellant, who owns a small rubber estate, was apprehended by a police officer while he was carrying the sheets of rubber. In the words of the police officer the appellant, when asked where he got the rubber, "could not give a satisfactory explanation". The Magistrate rightly held that the appellant had a case to answer.

The appellant, in evidence, gave an explanation of how he came by the rubber — that part was the produce of his own estate and part supplied to him by a friend. He did not call any evidence which would have enabled the Magistrate to have done so. It was, therefore, impossible to say with certainty that the appellant's explanation was untrue.

In deciding all cases such as this, where the burden of proving lawful possession of property is thrust upon the accused, the proper principle to apply is that laid down in the case of *Rex v. Aves*[1], which may, for the purposes of this appeal, be epitomised as follows. Where the only evidence against the accused is that he was in unlawful possession of property the court may infer guilty knowledge (i) if the accused has offered no explanation or (ii) if it is satisfied that any explanation offered is untrue; but if the explanation offered leaves the court in doubt as to whether it is true or not, the case has not been proved and the proper verdict should be not guilty. It does not appear from the record that the Magistrate bore this principle in mind when deciding the case.

The appeal is allowed.

H. G. HAMMETT v. NORTHERN MALAYA NEWSPAPERS LTD. & ANOR.

[Orig. Civ. Juris. (Jobling, J.) May 9, 1951]

[Penang Civil Suit No. 54 of 1951]

Specific performance — Agreed compromise of — Libel action — Publication of apology — Whether application by motion misconceived.

This matter came before the Court on a Motion for an order for specific performance of the terms of a compromise agreed upon by the parties in settlement of this section for damages for libel.

It appeared from the affidavits filed that the defendants agreed to publish an apology on certain terms and to pay $500 to named charities. It was not specifically stated but was implied that the apology was to be published in the "Straits Echo" in Penang and the plaintiff does not dispute this. The defendants subsequently found that it was impossible to publish the apology because some 41 members of their staff tendered their resignation as soon as it was known that it was intended to publish an apology and without their assistance the whole issue of the newspaper would be stopped.

Held, that it was an obvious and well-established rule that the Court will not make an order which it cannot enforce. The defendants had a complete answer to the order asked for and as the defendants' staff were not parties to the proceedings they could not be ordered to publish the newspaper.

Held also, that a compromise may be converted into an Order of Court upon Motion in proceedings pending before the Court and enforced like a judgment.